

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4240 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
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MAHENDRA MILLS LTD

Versus

MAMLATDAR

Appearance:

NANAVATI & NANAVATI for Petitioners
MR.VB GHARANIYA ASSTT GOVT PLEADER for Respondent No. 1
MR PH PATHAK for Respondent No. 2

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 29/07/98

ORAL JUDGEMENT

#. Mahendra Mills Ltd, a company registered under the Companies Act,1956 has filed the present petition to get a writ of mandamus to restrain the respondent No.1 from recovering the amount payable to respondent No.2.

#. The respondent No.2, Ramanbhai Patel is ex-employee of the petitioner Company. The appellant

authority under payment of Gratuity Act has passed an order in favour of respondent No.2 and against the petitioner company. By the said order the petitioner Company is to pay Rs.50,000/- and 10 % interest thereon. The petitioner company is financially sick company. Hence the company has made a representation under Section 15 of Sick Industrial Companies (Special Provisions) Act,1985 (hereinafter to be referred to as SICA). The respondent No.2 Ramanbhai Patel has obtained a recovery certificate to recover the said amount and has approached the Respondent No.1 to recover the same as dues under the Land Revenue Code. The petitioner company has averred that after the company made the representation the Board for Industry and Financial Reconstruction (hereinafter referred to be as BIFR) has declared the company to be a sick industrial company under Section 3(1)(o) of SICA and BIFR is making an enquiry under Section 16 of "SICA" and therefore the recovery of the said dues of Respondent No.2 be stayed by restraining both the respondent No.1 & 2 from recovering the same in view of the provisions of Section 22(1) of SICA.

#. Ramanbhai Patel respondent No.2 has contended the claim of the petitioner by filing the affidavit in reply. It is contended that the petition is misconceived and is not maintainable in law. The respondent No.2 is ex-employee of the company and the company is bound to pay gratuity to its' employee the respondent No.2. It is further contended that BIFR has not passed any specific order to stay the operation of the order of the controlling authority under the Payment of Gratuity Act,1972. Therefore the petitioner is bound to pay the amount payable to the respondent No.2 as his gratuity. It is contended that to get the amount of gratuity is a statutory right of the respondent No.2 and the same could not be curtailed by Section 22 of "SICA". It is further contended that the petitioner company had recently paid similar amount of gratuity to another workman and denied of same relief to the petitioner is arbitrary and illegal.

#. There is no dispute of the fact that the petitioner has approached the BIFR under Section 15 of SICA and BIFR had declared the petitioner as a sick company. The petitioner has produced the copy of the proceedings of the hearing held on 7-4-1997 at pages 11 to 66. The said proceeding clearly indicates that the BIFR is making inquiry under Section-16 and has yet to formulate and finalise any scheme for the survival of the petitioner company. The learned advocate for the petitioner has stated that the BIFR has not till today

finalised any scheme nor has filed any report to the company court to wind up the company. According to Mr.Nanavati, BIFR is still today trying to form some scheme for the survival of the petitioner. The said claim of Mr.Nanavati is not contravened by the other side by saying that any scheme is formed or by contending that a report is filed by BIFR to wind up the company before the company court. In the above background the rival claims are to be considered and decided.

#. In order to decide the controversy it is necessary to see the provisions of Section 22 of SICA. The said Section 22 runs as under :

22. Suspension of legal proceedings, contracts,
etc. -

Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation of consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then notwithstanding anything contained in the Companies Act,1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) Where the management of the sick industrial company is taken over or changed, notwithstanding anything contained in the Companies Act,1956(1 of 1956) or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law -

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the

shareholders of such company shall be given effect to unless approved by the Board;

(3) During the period of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board :

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under sub-section(3) with respect to sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly

- (a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and
 - (b) on the declaration ceasing to have effect-
- (i) any right, privilege, obligation or

liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy of the enforcement thereof remains suspended under this section shall be excluded."

The sub section (1) of Section 22 is applicable to the present case. The respondent No.2 has obtained an order of the competent authority under the Payment of Gratuity Act and he is trying to execute the said order in order to recover the amount payable to him. The Sub section 1 of Section 22 does not nullify the monetary claim against the Sick Company. It only suspends the process of execution of the monetary claim and prevents the recovery of monetary claim against the sick company by distress till the considerations BIFR under Section 16 to 19 of SICA. The subsection 5 of Section 22 gives protection to the person who are holding monetary claim by excluding the time under which the suspension of the execution of monetary claim is suspended under sub section 1 to 4 of Section 22. The Sub section 1 of Section 22 in its concluding portion also provides that a person who wants to execute the monetary claim will have to obtain the consent of BIFR or the Appellate Authority. The Apex Court in the case of TATA DIYA LTD. VS STATE OF ORRISSA 1997 (6) S.C.C. 669 has considered the implication of Section 22 of SICA and has laid down following principles :

In the larger interest of industrial health of the nation, Section 22 of Control Act requires all the creditors seeking to recover their dues from the sick industrial companies in respect of whom an inquiry under section 16 is pending or a scheme is under preparation or consideration or has been sanctioned to obtain the consent of the Board for such recovery. if such consent is not

secured and the recovery is deferred, the creditors' remedy is protracted for the period of deferment and is by reason of Section 22(5) excluded in the computation of the period of limitation. The words "any other law" in section 22 cannot therefore be read in the manner suggested by the respondent State.

Therefore the respondent State cannot recover arrears of Sales Tax from the appellant company without first seeking consent of the said Board in this behalf.

#. The above said observations of Supreme Court are applicable to the present case. As soon as the competent authority under the Payment of Gratuity Act passes an order directing the petitioner to pay to respondent No.2 Rs.50,000/- and 10 % interest thereon, the respondent No.2 become a creditor of the petitioner. He therefore cannot seek the execution of the order in his favour through respondent No.1 without obtaining the consent of BIFR till the considerations under Section 16____ of SICA are pending before BIFR. The learned Advocate for the Respondent No.2 Mr.Pathak cited before me case of DEPUTY COMMERCIAL TAX OFFICER AND OTHERS VS CORROMANDAL PHARMACEUTICALS AND OTHERS 1997 (2) SCALE 640. But if the facts of the said case are considered then it will be quite clear that the same is not applicable on facts to the case before me. In that case company was declared as sick industrial company and scheme for rehabilitated was sanctioned in 1990 and thereafter modified in 1993. Sick company had recovered sales tax after implementation of the scheme of rehabilitated and the State Govt. had initiated action to recover sales tax recovered by the sick company. The sick company attempted to prevent the said action by taking aid of Section 22 of SICA. The Apex Court rejected the claim of Sick company by making the following observations :

"The language of Section 22 of the Acts wide.

But in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act, though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, tillafter the

implementations the scheme or the disposal of an appeal under Section 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like sales tax, etc. which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amount due to the Revenue and withhold it indefinitely and unreasonably. "

In the instant case scheme is not yet approved and sanction the enquiry and investigation under Section 16 of the SICA is going on. I have quoted above TATA DIVYA LTD. VS STATE OF ORISSA 1997 (6) S.C.C. 669 which was also a case in which the q the recovery of Sales Tax is considered and on facts it is held that the same could not be recover in view of the Section 21 without the consent of BIFR. The case cited by the learned advocate for the respondent No.2 is not applicable to the facts of the case before me.

#. Mr.Pathak then cited before me BABURAO TAWADE AND OTHERS VS HES LTD AND OTHERS 1995 (2) CLR 81

But in view of the subsequent decision of the Supreme Court in TATA DIVY SUPRA it must be said that said the case is not laying down correct position of law. It must be held that they it stands overruled by the said Apex Court decision.

#. Mr.Pathak, learned advocate for the respondent urged before me that no order as contemplated by Sub Section 3 of Section 22 is passed by Board and hence the said Section 22 is not applicable. But if the proceedings of the Board are seen then it would be quite clear that the inquiry under Section 16 is going on and no scheme of revival is approved or set down by BIFR and hence there is no application of Sub Section 3 in this case.

#. It is also urged on behalf of the respondent No.2 that the petitioner had paid amount of similar claim and

hence the petitioner's present action is arbitrary. The petitioner has clarified its position by filing rejoinder. It is stated therein that in that case this High Court has passed an order in SCA 2646/1997 directing the petitioner to pay the said amount though the petitioner was not made a party to the petition. It is submitted by Mr.Nanavati, Senior Counsel appearing on behalf of the petitioner that it was not a sou motu and voluntary payment. But in order to avoid the contempt of this court the petition had paid that amount. In view of the above circumstances it could not be said that the petitioner's present petition is an arbitrary action.

##. Thus in view of all the above discussion, the present petition must be allowed. I hereby restrain the respondent No.1 and 2 to execute the recovery order in favour of the Respondent No.2 Ramanbhai Patel without obtaining consent of Board or as the case may be the Appellate Authority under SICA as longs the petitioner is before the Board. Rule is made absolute in above terms. No order as to cost.

Date : 29-07-1998 (S.D.Pandit,J.)

(KPP)